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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

BRIEF OF AMICUS STATE OF HAWAII ~~IN SUPPORT OF APPELLEES' MOTION TO DISMISS OR AFFIRM~~

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INTEREST OF AMICUS

This brief *amicus curiae* on behalf of the State of Hawaii (hereinafter "Hawaii") is respectfully submitted pursuant to Supreme Court Rule 42 by Ronald Y. Amemiya, Attorney General for the State of Hawaii, and Lawrence D. Kumabe and

Michael A. Lilly, Deputy Attorneys General. The State of Hawaii believes that for the reasons stated herein, this Court should affirm the judgment of the Supreme Court of Alaska or, alternatively, dismiss the appeal pursuant to Supreme Court Rule 16.

The State of Hawaii is gravely concerned about the issues raised by this appeal. The Alaska statutes challenged herein, A.S. 38.40 (hereinafter the "Alaska Hire Law"), were specifically enacted by the Legislature of the State of Alaska to help to resolve chronic unemployment within the state, due both to cultural and geographical migration barriers.[1] The Alaska Hire Law also implements Alaska's need to develop its human resources to their fullest potential by providing maximum employment opportunities to its residents.[2]

Hawaii, like Alaska, shares similar problems and similar concerns. Like Alaska, it is unique from other states because of its geographic isolation from the rest of the United States. Moreover, Hawaii also has a unique and significant cultural and ethnic composition and a very high rate of unemployment.

This means that migrant job-seekers pose problems for

[1]Sec. 38.40.020, Alaska Statutes, provides:
"LEGISLATIVE FINDINGS. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are non-recurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state."

[2]Sec. 38.40.010, Alaska Statutes, specifically provides:
"STATE POLICY. It is the policy of the state in development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resources management."

local residents in Alaska and Hawaii faced by very few other states. If an in-migrant takes a job from a local resident, during a period of high unemployment, that local resident may not have the financial or cultural resources to bear the financial and psychic cost of out-migrating to another state. A vast expanse of ocean separates Hawaii from the mainland United States. An Alaskan resident must migrate across Canada. These problems are particularly severe for the chronically unemployed local resident. With increased in-migration, higher unemployment results. More people must be supported at public expense.

In Hawaii, these problems are compounded by a severely limited geographical area and increasingly severe water shortages and alarmingly high levels of air and water pollution. Over-population may ultimately mean the demise of Hawaii's visitor industry, which substantially relies on the state's natural beauty to maintain its attractiveness as a tourist destination. In 1976, visitor expenditures totalled $1.45 billion, defense expenditures $1.03 billion, while sugar produced only $252 million in income for the state and pineapple production generated $120 million.

Consequently, the Legislature of the State of Hawaii, like Alaska's legislature, has also enacted restrictions on public employment requiring Hawaii residency for the vast majority of public jobs. See Appendix 1, §78-1, Hawaii Revised Statutes.

If the Alaska Hire Law is struck down, not only will chronic unemployment rise, but a state, having lost control over its ability to maintain the welfare of its people, would be powerless to avoid the onset of an economic recession, aggravated by migrant job-seekers.

Appellants, in their Jurisdictional Statement, have spoken in very lofty terms of "parochialism" or "Balkanization." (Appellants' Jurisdictional Statement, at p. 20.) However, these concerns are rather academic in states like Alaska and Hawaii where the effects of uncontrolled in-migration have immediate

and telling effects on the health and well-being of state residents. Moreover, Appellants have pointed to no authority that has upheld a constitutional attack on statutes merely requiring state residency for employees hired for public jobs.

The State of Hawaii, as *amicus curiae*, cannot more strongly urge this Court to either dismiss the appeal or affirm the judgment of the Supreme Court of Alaska.

OPINION BELOW

The Alaska Supreme Court in *Hicklin v. Taylor*, (appearing in Appellants' Jurisdictional Statement, Appendix 1), while it struck down the one-year durational residency requirement contained in the Alaska Hire Law, merely held that the preferences contained in the statutes requiring Alaska residents to be hired before non-residents by employers holding oil and gas leases from the State of Alaska were constitutionally valid.

ARGUMENT

I. THE ALASKA HIRE LAW DOES NOT DENY APPELLANTS EQUAL PROTECTION OF THE LAW.

At the outset, it is important for this Court to note that the Appellants have abandoned their equal protection attack on Alaska's Hire Law, in this appeal in favor of a constitutional attack utilizing the privileges and immunities clause (Art. IV, Sec. 2) of the United States Constitution. However, Appellants still cannot avoid the body of clearly defined law developed in equal protection cases, by utilizing an approach where constitutional analysis is still rather vague.

A. The Alaska Hire Law does not affect fundamental rights or suspect classifications to justify the use of strict judicial scrutiny.

The parameters for the equal protection test has been clearly set forth by this Court first in *San Antonio School Dist. v. Rodriguez*, 411 U.S.1, 36 L.Ed.2d 16 (1973) and more recently in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 49 L.Ed.2d 520 (1976). First, the inquiry is whether fundamental rights are affected by the challenged statutory classification. Next, it must be determined whether any suspect classes of individuals are involved who had previously been subject to invidious discrimination. If either fundamental rights are involved or suspect classifications, strict judicial scrutiny of the statute is required. If not, then the less stringent rational basis test must be used.

The Alaska Hire Law clearly does not affect any fundamental rights. While an *entire* occupation or calling cannot be foreclosed from non-residents by denying them occupational licenses, there is no concurrent fundamental right to public employment. *Massachusetts Board of Retirement v. Murgia*, *supra*. This logically extends to private employers holding public leases, as is the case with the Alaska Hire Law.

This position is eminently reasonable. The State of Alaska, acting in its proprietary capacity as a lessor has a direct interest in the maintenance and development of a stable, qualified work force within the state to increase its economic well-being and further develop its resources. Consequently, it can legitimately set terms and conditions of employment for employees of employers holding public leases.

Residence within the state is hardly an unreasonable job restriction. In order to be a resident, it is necessary to at least establish a domicile in the state. *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63 (1973); *State v. Adams*, 522 P.2d 1125 (1974). One also must intend to be a permanent resident of the state.[3] An individual with no domicile or intention to reside within the state would hardly be an employee who could be expected to remain in the state and continue to contribute to its economy. The state has no interest in developing an economy based largely on a transient, migrating work force.

[3]See Restatement (Second) of Conflict of Laws §18 (1971).

In addition, the Alaska Hire Law clearly does not involve any suspect classifications. While race or alienage constitute classifications either of a permanent or long-standing nature, residency cannot possibly be characterized in the same way. It is easy to change residency. Only a few months in the intended state of residence will at most be necessary. Moreover, non-residents can hardly claim to have suffered from a long history of invidious discrimination.

Because neither fundamental rights nor suspect classifications were involved, the Alaska Supreme Court clearly did not err in subjecting the statutes at issue in the instant case to the rational basis test, rather than requiring strict judicial scrutiny, in upholding the Alaska Hire Law.

B. The Alaska Hire Law has a rational basis and is, therefore, constitutionally valid.

Before proceeding to consider Appellants privileges and immunities argument, it is instructive to examine the rational basis behind the Alaska Hire Law. In explaining the basis for the law, the Alaska Supreme Court also addressed the justification for the statute for purposes of rebutting the privileges and immunities attack. In *Hicklin v. Taylor*,[4] the Alaska Supreme Court said:

> "*McCready v. Virginia*, *supra*, has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to the decision of this case. Article VIII, section 2 of the Alaska Constitution, stating that Alaska's natural resources shall be used and developed in ways that will benefit Alaska's people, is not inconsistent with the privileges and immunities clause. The natural resources of Alaska 'belong' to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not."

[4]See Appellants' Jurisdictional Statement, Appendix I (Unpublished Opinion of Alaska Supreme Court, dated June 8, 1977).

The Court went on to say:

> "We rely on the *McCready* 'natural resources exception' to the privileges immunities clause. The trial court, on the other hand, upheld the law on the ground that it was not economic protectionism for its own sake, and so fell within the 'independent reasons' exceptions to the privileges and immunities clause articulated in the quotation from *Toomer*, *supra*. The trial judge referred to Alaska Hire as an attempt to solve 'problems that may be typified as social, racial, educational, and economic.' We are hesitant to classify Alaska Hire as something other than an attempt to strengthen the Alaskan economy. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 79 L.Ed. 1032, 1038 (1935), a commerce clause case, the Supreme Court rejected an attempt to justify regulation of the price of imported milk by analogy to regulation of its purity, which would unquestionably be valid. We believe that the better alternative is to consider Alaska Hire an economic measure justified by the 'natural resources exception,' the principle that a state may prefer its residents in dealing with natural resources it owns."

Similarly, in Hawaii the 1977 Session of the Hawaii Legislature enacted Act 211, Session Laws of Hawaii, which provided for a one-year durational residency requirement for public employment.[5] Like the State of Alaska, the State of Hawaii was concerned about the preservation of its far from abundant resources and controlling rampant unemployment within the state. Preserving public jobs for state residents was also viewed as a means to attempt to check the flood of in-migrants who would only add to the state's increasing unemployment and escalating welfare costs.

The exercise of police power to preserve the character of a particular region, its open spaces and low density of popula-

[5]See Appendix I.

tion; and to grow at an orderly and deliberate pace is not unconstitutional. *Construction Industry Association v. Petaluma*, 522 F.2d 897 (CA 9, 1975) cert. den. 424 U.S. 934; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) and *Ybarra v. City of Los Altos Hills*, 503 F.2d 250 (CA 9, 1974). The Constitution of Hawaii explicitly mandates that the State act in these areas. Section 1, Article VIII of the Constitution provides, "The State *shall* provide for the protection and promotion of public health." Section 5 of this same article further provides, "The State shall have power to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and physical good order. . . ."

In Hawaii, a uniquely insular community which has limited land area, population growth can be the source of many social, economic, and public welfare problems. People consume resources and create waste. More people, more resources consumed and more waste created. People take up space; more people, less space and more crowding. People require shelter; more homes, less land for agriculture or other alternate uses.

Population changes in the State have various components:
A. Births in State
B. Deaths in State
C. In-migration
D. Out-migration

Births and in-migration increase the population. Deaths and out-migration decrease the population. Attempting to control the growth of population by *directly* controlling birth and death rates would be constitutionally and no doubt morally reprehensible.

This leaves influencing in-migration and out-migration. Conceivably, a State could promote out-migration. But, besides the fact that the Hawaii Legislature has chosen not to take this approach, several other considerations would seem to mitigate against this method of controlling growth. For example, the public costs could be exorbitant and various factors which may tend to encourage out-migration may also detract from the attractiveness of Hawaii as a tourist attraction. This leaves only legislation influencing in-migration, such as the Alaska Hire Law.

Hawaii, like Alaska, is faced with the real prospect of irretrievably losing many of its natural assets vital to its welfare unless immediate action is taken.

The Alaska Hire Law has a clear rational basis in giving a state the means to avoid becoming a depressed area, with a population far out of proportion to its resources. The State of Hawaii submits that the statute meets valid, legitimate state interests. These interests must be addressed by the states while the Congress of the United States for the first time in our nation's history must attempt to address the problems created by a continually increasing population and rapidly diminishing natural resources.

These twin problems of finite resources and of population growth and redistribution must ultimately be addressed. If these concerns are submerged, if states like Alaska and Hawaii are unable to respond to these problems merely because a few appellants talk in overly strident tones of "Balkanization" or "parochialism," then the states could very well forget about the Federal system that was created to meet their often very individual needs, while they await further Congressional action.

II. THE ALASKA HIRE LAW DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION (ART. IV, SEC. 2).

We now turn to Appellants' privileges and immunities attack. Because the authority in this area is far from clear, it is too easy to lose sight of the fact that the constitutional analysis under the privileges and immunities clause is very similar to an equal protective analysis.

In general, the analysis requires:

1. The privileges and immunities allegedly denied must be fundamental rights of citizens within the state.

2. If certain fundamental rights are affected, the statutory classification may still be constitutionally valid, if there is a legitimate, independent reason supporting the statute.

Because no fundamental rights are being denied to Appellants and because the Alaska Hire Law has a valid, rational basis for the classifications created by the statute, the State of Hawaii respectfully submits that the statute must be upheld and the decision of the Supreme Court of Alaska affirmed.

A. The Alaska Hire Law does not violate any fundamental rights protected by the privileges and immunities clause.

Both the Appellants in their jurisdictional statement and Appellees in their motion for dismissal or affirmance in the instant case apparently accept the definition of "privileges and immunities" set forth in the opinion of Mr. Justice Bushrod Washington, sitting on circuit in 1823 in *Corfield v. Coryell*, 6 F.Cas. 546, 551-52, (No. 3230) (C.C.E.D. Pa. 1823). It is, he said, limited to "those privileges and immunities which are, in their nature, fundamental." It includes "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Accord*, *Geer v. Connecticut*, 161 U.S. 519, 40 L.Ed. 793 (1896); *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248 (1877).

Consequently, if public employment or employment by an employer holding a public lease is not a fundamental right for purposes of equal protection, it is difficult to see how public employment with the state can be a fundamental right for purposes of a privileges and immunities analysis. This Court has repeatedly held that there is no fundamental right to a

public job, nor is there any property right inherent in a public job for purposes of due process, merely because an individual applies for the job. *Massachusetts Board of Retirement v. Murgia*, *supra*; *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

It is also important to remember that no suspect classifications, such as sex, race, or alienage are at issue.

Consequently, the cases cited by Appellants are inapposite. They concern fundamental rights only as applied to either interstate commerce or alienage, not public employment.

B. The Alaska Hire Law has an independent, rational basis.

Moreover, the Alaska Hire Law has an independent, rational basis. See *Toomer v. Witsell*, 334 U.S. 385, 92 L.Ed. 1460 (1948). Not only does it satisfy the reasons we have already set forth above, but it serves both the State's policy of maintaining a stable work force as an employer and distributing scarce economic resources to state residents, and discouraging in-migrants who might otherwise re-locate only to find that they cannot in turn find a job or who might keep an Alaskan resident unemployed, who would still have to be supported at public expense.

CONCLUSION

Based on the points and authorities above-cited, the State of Hawaii as Amicus Curiae respectfully urges that this Court either dismiss this appeal or affirm the judgment of the Supreme Court of Alaska.

RESPECTFULLY SUBMITTED, at Honolulu, Hawaii, this 27th day of January, 1978.

Respectfully submitted,

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Appendix 1

ACT 211 S.B. NO. 1350

A Bill for an Act Relating to Residency Requirements for Public Employment.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Section 78-1, Hawaii Revised Statutes, is hereby amended to read as follows:

"Sec. 78-1 Citizenship and residence of government officials and employees; exemptions. (a) All officers, whether elective or appointive, in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens of the United States and residents of the State for at least three years immediately preceding their appointment.

(b) All employees in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens, nationals or permanent resident aliens of the United States and residents of the State for at least one year immediately preceding their application for employment.

(c) For the purpose of obtaining services which are essential to the public interest for which no competent person with the qualifications under subsection (b) applied within forty-five days after the first publication of an advertisement of the position or a notice of an examination therefor, which advertisement or notice has been published more than once, and not oftener than once a week, in a newspaper of general circulation in the State, a person without the qualifications may, upon prior certification by the state director of personnel services of the city and county director of civil service or the county personnel director, whichever is applicable, and with the approval of the chief executive officer for the State or the political subdivision concerned, be employed.

(d) The requirement of residency, as defined under subsec-

tion (b) above, shall not apply to a resident who was a resident of the State for at least one year immediately before marrying a non-resident and who continues to reside in the State.

(e) For the positions involved in the performance of services in planning and executing measures for the security of Hawaii and the United States, the employees shall be citizens of the United States in addition to meeting the requirement of residency in subsection (b).

(f) The requirement of residency, as defined under subsection (b) and the requirements of subsection (c) shall not apply to persons recruited by the University of Hawaii under the authority of Chapter 304-11; provided however, that all persons recruited as Administrative/Professional/Technical personnel of the University of Hawaii shall be subject to the requirement of residency; provided further that appointment of persons to positions requiring highly specialized technical and scientific skills and knowledge may be made without consideration of residency.

SECTION 2. **Severability.** If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 3. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.*

SECTION 4. This Act shall take effect upon its approval.

(Approved June 21, 1977.)

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*Edited accordingly.

AFFIDAVIT OF SERVICE

STATE OF HAWAII)
)
CITY AND COUNTY OF HONOLULU)

I, LAWRENCE D. KUMABE, being duly sworn, on oath deposes and says that copies of the Brief hereof were served upon the following persons in accordance with Rule 33(1) of the Rules of the Supreme Court of the United States by mailing the same to them, by air mail postage prepaid, at the following addresses on January 27, 1978:

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Subscribed and sworn to before
me this 20th day of January 1978.

/s/ MAY M. C. YOUNG
Notary Public, First Judicial
Circuit, State of Hawaii
My commission expires: May 16, 1980